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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Granting of Writ of Certiorari.

Statement.

Petitioner was charged in a verified amended complaint with violation of Section 311.2 of the California Penal Code, knowingly distributing obscene matter, to wit, the book *Tropic of Cancer,* by Henry Miller.

Petitioner was duly arraigned and entered a plea of not guilty. On the trial date petitioner waived trial by jury; however, he was tried by jury on demand of the plaintiff, The People of the State of California. The trial commenced January 15, 1962, and culminated in a guilty verdict February 23, 1962. Petitioner was grant-

ed probation on condition he serve the first thirty days of his probationary period in jail.

On appeal to the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, the order granting probation was affirmed (unpublished opinion, Petition, App. A). As stated in the petition, that court on its own motion certified the cause to the District Court of Appeal of the State of California, and such court denied the certification. Petitioner now seeks a writ of certiorari.

ARGUMENT.

I.

Sections 311.2 and 311(a) of the California Penal Code Provide a Reasonable Ascertainable Standard of Guilt.

This Court, in *Roth v. United States* and *Alberts v. California* (1957), 354 U. S. 476 at 489, presented the following definition of obscenity: . . . . . .

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

And further, in footnote 20, page 487:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, Sec. 207.10 (2) (Tent Draft No. 6, 1957), viz:
>
> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . ."

In 1961 California amended its obscenity statute (Penal Code Section 311.2) to provide:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, or to exhibit or offer *to* distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4428, sec. 5.)

Section 311(a) of the Penal Code defines "obscene" to mean:

> " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Stats. 1961, c. 2147, p. 4427, sec. 5.)

The phrase "utterly without redeeming social importance" appears to be taken from *Roth-Alberts*, at page 484.

It is clear that California, in enacting these statutes, has so closely followed the *Roth-Alberts* case that in effect this Court has written them.

II.

The Trial Court Followed the Proper Constitutional Standard as to Instructing the Jury on Contemporary Standards.

Petitioner urges that the trial court purportedly restricted the limits of candor in description or representation of sex, nudity and excretion, to the community of Los Angeles, whereas a national standard should have been applied.

Although petitioner did submit an instruction [C. T. 61] purporting to clarify the meaning of contemporary standards, such instruction by its very terms, rather than clarifying, would have confused this issue and was properly refused because, from its context, it purported

to request a personal opinion of the trial judge rather than a statement of the law. An instruction that confuses and befogs the issue is properly refused (*People v. Roe* (1922), 189 Cal. 548, 559, 209 Pac. 560); where an instruction is an incorrect statement of the law it is properly refused (*People v. Housman* (1941), 44 Cal. App. 2d 619, 628, 112 P. 2d 944); even assuming for purposes of argument that the instruction was partially correct, the court is justified in rejecting the instruction as a whole because of the parts manifestly improper (*People v. Lorraine* (1928), 90 Cal. App. 317, 335, 265 Pac. 893).

The trial court, in its instruction to the jury,[1] did not limit the word "community" to the City of Los Angeles but in fact instructed in the language of Section 311(a) and the *Roth* case: ("applying contemporary standards . . . which goes substantially beyond customary limits of candor in description or representation of such matters . . .").

There may have been an academic discussion as to the limits of contemporary standards at the bench, but no such discussion ever took place in the presence of the jury.

At no place in the record may be found petitioner's objection to, or the slightest disagreement with, the trial court's position as to the scope of contemporary

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[1]Plaintiff's two-page Instruction on Penal Code Section 311, subsection (a), citing *Roth v. United States* and *In re Harris*.

standards, nor did he offer to prove that the contemporary standards of Los Angeles were in any manner different from those elsewhere.

The impropriety of imposing a national community standard of obscenity upon the states, as petitioner suggests, has been best expressed by Mr. Justice Harlan, dissenting and concurring in *Roth-Alberts* (*supra*, at p. 504):

> "But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsiblity for the protection of the local moral fabric."

And further (at p. 505):

> "It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might

be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books."

III.

The Book "Tropic of Cancer" by Henry Miller Is Obscene.

The pattern of petitioner's trial was to great extent determined by this Court. In enacting its new obscenity statutes under which petitioner was prosecuted, California of course followed the rule of *Smith v. California*, 361 U. S. 147, and included the necessary element of scienter. California Penal Code Section 311.2 provides that the acts prohibited therein be done *knowingly*, and Section 311(e) (App. A) defines *knowingly* as having knowledge that the matter is obscene.

The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 366 P. 2d 305, declared that the exclusion of expert testimony in an obscenity case was denial of due process of law, following the lead of Mr. Justice Frankfurter concurring in *Smith v. California*.

The scienter requirements of *Smith v. California* and the code section were met with testimony that, at the time of the sale of the book to the arresting officer,

petitioner stated he knew the book *Tropic of Cancer* was obscene.[2-3]

The book [Pltf. Ex. 4, Rep. Tr. Vol. 2, p. 348, line 1] was read to the jury and thereafter plaintiff produced and qualified as experts these eighteen witnesses, who testified that in their opinion *Tropic of Cancer* was utterly without redeeming social importance and was obscene as such term is defined by California Penal Code Section 311(a).

Leon Uris

[Rep. Tr. Vol. 11, pp. 1088-1106][4]

Professional writer [p. 1088, line 24].

Author of such internationally famous novels as *Exodus, Battle Cry, The Angry Hills,* and the current bestseller *Mila 18* [p. 1089, lines 15-26; p. 1091, lines 20-21].

Dr. Frank Baxter

[Rep. Tr. Vol. 9, pp. 350-498].

Lecturer and television personality [p. 350, lines 23-24].

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[2]People's Exhibit 1, a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to arrest, admitted in evidence Rep. Tr. Vol. I, p. 81, lines 9-11:

Question [by arresting officer, at p. 1, lines 16-17]: You say it [Tropic of Cancer] is obscene?

Answer (by petitioner): It's obscene.

Question [by arresting officer, at p. 4, lines 13-17]: I didn't see this [Tropic of Cancer] for sale down on the street? That's why—

Answer (by petitioner): We don't sell it down there.

Question. How come?

Answer. It's obscene—

[3]Rep. Tr. and Volume numbers indicate original page numbering in Reporter's Transcript.

[4]Rep. Tr. and Volume number indicates original page numbering in Reporter's Transcript.

Professor Emeritus of English and American Literature, University of Southern California for 31 years [p. 351, lines 1-3; 18-20]; Chairman of the English Department, U.S.C., for eight years [p. 351, lines 9-11]; Resident of Los Angeles County since 1930 [p. 350, lines 15-17].

Bachelor of Arts and Master of Arts degrees, University of Pennsylvania [p. 352, lines 16-18]; Doctor of Philosophy degree from Trinity College, Cambridge, England [p. 352, lines 19-21]; recipient of four Honorary Doctorates, three in Letters and one in Fine Arts [p. 358, lines 16-17].

Author of seven articles for the Encyclopedia Brittanica [p. 348, lines 24-25].

Past President of Phi Beta Kappa Chapter at U.S.C. [p. 353, lines 19-21]; served as First Chairman, U.S.C. Academic Senate [p. 353, lines 22-25].

The first individual in the United States to receive the George Peabody Award, a national honor for excellence in television programming [p. 355, lines 9-26]; has received approximately 35 national honors for pioneering in educational television, including The Sylvania, a citation from the National Association For Better Radio and Television, two Ohio State awards, and seven "Emmys" from the National Academy of Motion Picture Arts and Sciences, an "Emmy" being a statuette similar in nature to a motion picture "Oscar," awarded by the television industry to those in the industry whom the members deem worthy of praise [p. 357, lines 2-12].

Mrs. C. H. Culbertson

[Rep. Tr. Vol. 3, pp. 529-542].

President of the State of California Congress of Parents and Teachers, also known as the PTA [p. 529, lines 16-17]. The California Congress of Parents and Teachers comprise an organization of over a million and a half members [p. 529, line 23], making this group the largest parent-teacher assemblage within the United States.

Arthur J. Kates

[Rep. Tr. Vol. 2, pp. 438-528].

Owner-manager of the Sunset News Co., Los Angeles [p. 440, lines 21-24], the largest distributor of periodicals in California, and one of the two or three largest distributors in the United States [p. 442, lines 2-8].

Mr. Kates' Sunset News Co. distributes ninety per cent of all periodicals sold in the Los Angeles area [p. 442, lines 14-21].

Sunset News Co. distributes to 1400 different accounts [p. 443, line 9], the leading department stores in Los Angeles [p. 443, lines 14-15]; supermarkets [p. 443, lines 20-24]; drug stores [p. 443, lines 8-12]; bookstores [p. 444, lines 13-17], and such universities as U.S.C., U.C.L.A., Los Angeles State College [p. 444, lines 19-22].

The volume of Sunset News Co. periodicals sold to its 1400 accounts in 1961, included 22 million single magazine copies and five million copies of paperback books [p. 445, lines 4-8], and Sunset News Co. distributes between 200 and 250 different titles of books and magazines per week [p. 446, line 26].

The magazine titles run the gamut from Saturday Evening Post, Look, Life, Time [p. 515, lines 8-10], to such girlie magazines of nude models and chorus girls as Dude, Gem and Playboy [p. 475, lines 1-3; p. 483, lines 16-18].

Mr. Kates has a Bachelor of Arts degree from Stanford University and was a member of Phi Beta Kappa while at Sanford [p. 439, lines 6-20].

He has been a resident of Los Angeles for fifty years [p. 438, line 23]; has been in the periodical distributing business for over twenty-five years in Los Angeles [p. 446, lines 8-11], and has by virtue of this experience an intimate knowledge of the books and magazines that circulate as community standards in the community of Los Angeles [p. 446, lines 12-20].

The paperback edition of *Tropic of Cancer* was offered to Mr. Kates by Grove Press for distribution to his 1400 accounts prior to the arrest of petitioner Bradley Reed Smith [p. 450, lines 15-27], an offer which Mr. Kates refused [p. 451, line 22], in spite of the fact that Grove Press offered to defray the legal expenses of any prosecution which might arise as a result of the distribution of the book [p. 502, line 20, to p. 503, line 10].

Rabbi Ernest R. Trattner
[Rep. Tr. Vol. 9, pp. 449-581].

Rabbi of Westwood Temple [p. 500, line 20]. Westwood Temple has a congregation of 700 Jewish families. Rabbi Trattner has resided in Los Angeles for forty years [p. 500, line 23].

Rabbi Trattner received his Bachelor of Arts degree from the University of Southern California, a Master's degree from Columbia University, and Honorary Doctorate degrees from Andhra University, Jaipur, India, the University of Bari, Italy, and the Institute of Religious Science and School of Philosophy of Los Angeles [p. 501, line 1, to p. 502, line 4; p. 560, lines 5-19].

Rabbi Trattner is the author of five published works: *Unraveling the Book of Books, The Autobiography of God, As a Jew Sees Jesus, The Architect of Ideas*, and *Understanding the Talmud* [p. 503, lines 24-26].

Dr. Marcus Crahan

[Rep. Tr. Vol. 10, pp. 642-687],

Psychiatrist and Physician and Surgeon [p. 643, line 10].

Medical Director of the Correctional Facilities of Los Angeles County, with 8000 inmates under his direct supervision and control [p. 643, lines 11-15; p. 648, lines 1-2].

Dr. Crahan is presently a member of the Los Angeles Superior Court panel of psychiatric experts, and is also a member of the Department of Mental Hygiene for Los Angeles County [p. 643, line 16-18]. He has conducted psychiatric examinations, by court appointment, for between 5000 and 10,000 individuals [p. 644, lines 7-9].

Dr. Crahan received his Bachelor of Arts and Doctor of Medicine degrees from Syracuse University. He has resided in Los Angeles since 1925 [p. 643, line 4; p. 644, lines 10-25]. He is currently a professor at the University of Southern California School of Medicine, and on the Staff of St. Vincent's and Los Angeles County General Hospitals [p. 645, lines 1-7].

Dr. Crahan has conducted psychiatric and medical research at U.C.L.A., California Institute of Technology, Johns Hopkins University, and U.S.C.

Dr. Crahan has served as Chairman of the Church and Community Committee of Los Angeles, which committee is comprised of all the major churches, leading educators, citizens, public officials and members of the judiciary, whose function is to deal with the problem of sexual deviancy in Los Angeles [p. 645, lines 13-23].

An avid book collector, Dr. Crahan is a regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental, California at Berkeley, the Southwest and Los Angeles County Museums [p. 646, lines 21-24]. He is a member of such book collectors' clubs as Groiler's of New York, The Roxboro of San Francisco, and the Zamarano of Los Angeles. He has served as President of the Zamarano Club of Los Angeles [p. 646, line 25, to p. 647, line 3].

Dr. Crahan's personal library consists of from three to four thousand volumes [p. 647, lines 16-17].

Dr. C. C. Trillingham

[Rep. Tr. Vol. 4, pp. 626-667].

Los Angeles County Superintendent of Schools since 1942 [p. 626, line 25, to p. 627, line 8]. Dr. Trillingham has jurisdiction over 1500 schools which comprise Los Angeles County, including all public schools from elementary through junior college [p. 627, lines 9-17], encompassing an enrollment of 1,500,000, pupils [p. 628, lines 11-12].

Dr. Trillingham received his Bachelor of Arts, Master of Arts and Doctor of Philosophy degrees from the

University of Southern California [p. 628, line 23, to p. 629, line 4].

President of the American Association of School Administrators for the year 1958, a nation-wide organization comprising 13,000 educators [p. 630, lines 18-26].

Past President of the Los Angeles Lions Club [p. 629, lines 5-10]; member of the Board of Trustees of Whittier College for 17 years [p. 630, lines 6-7]; member for the past 17 years of the State of California Curriculum Commission.

Dr. Raymond Lindquist

[Rep. Tr. Vol. 5, pp. 894-937].

Senior Minister of the Hollywood First Presbyterian Church since 1953 [p. 894, lines 20-26].

Dr. Lindquist's church has a congregation of 8000 members, making it the largest Presbyterian Church in the United States, and probably the largest in the world [p. 895, lines 3-9].

He received his Bachelor of Arts degree from Wheaton College, Illinois; attended Columbia University Law School for one year; acquired a Bachelor of Theology at Princeton Theological Seminary, and a Master of Arts in Philosophy at Princeton. He is the recipient of an Honorary Doctor of Divinity degree from Cumberland University, Tennessee, and an Honorary Doctor of Laws from Bloomfield College, Bloomfield, New Jersey [p. 899, lines 11-18].

In addition to his position as Senior Minister of the Hollywood First Presbyterian Church, Dr. Lindquist is also President of the Board of National Missions

of the Presbyterian Church [p. 895, lines 22-23]; a Trustee of Princeton Theological Seminary [p. 896, lines 14-15], as well as a Director of the Presbyterian Ministers Fund, the oldest insurance company in the United States [p. 897, lines 2-3].

Dr. Howard S. McDonald
[Rep. Tr. Vol. 5, pp. 779-817].

Dr. McDonald has been President of Los Angeles State College [p. 779, line 23] since 1958 [p. 780, line 3]. Los Angeles State College has an enrollment of 16,000 students [p. 780, lines 6-7]. Is Past President of Brigham Young University [p. 781, lines 1-2]; President of the combined Los Angeles City and Los Angeles State Colleges from 1949 to 1958, with an enrollment of 28,000 students [p. 781, lines 8-18].

Bachelor of Science degree from Utah State University; Masters and Doctorate of Philosophy degrees from University of California at Berkeley.

Mrs. Elizabeth Lewis
[Rep. Tr. Vol. 5, pp. 850-859].

Past Chairman and present member of the Board of Trustees, California Women's Prisons [p. 851, lines 4-15].

Mrs. Lewis received her Master's degree from the University of Edinburgh, Scotland [p. 851, line 23, to p. 852, line 2], and has resided in Los Angeles for 36 years [p. 851, line 1].

She was President of the Los Angeles Tenth District PTA from 1952 to 1954, which included the entire Los Angeles City School District [p. 852, lines 18-26].

President of the Federation of Community Coordinating Councils from 1946 to 1949. This is an organization made up of 100 local community councils whose functions are to deal with all types of problems arising in the community [p. 853, lines 7-24].

President of the Los Angeles YWCA for 3 years [p. 854, lines 6-8].

Member for 6 years of the Citizens Advisory Committee to the Attorney General on Crime Prevention [p. 855, lines 4-10].

Father Clarence E. Crowther
[Rep. Tr. Vol. 10, pp. 584-603].

Senior Episcopal Chaplain, University of California at Los Angeles [p. 584, lines 24-26].

Bachelor of Arts degree, University of Leeds, England; Bachelor of Laws and Master of Laws, University of Leeds. Past Professor of criminal and constitutional law, Oxford University [p. 585, line 23, to p. 586, line 7].

Graduate of Oxford Seminary, Oxford, England; ordained to the ministry of the Church of England in 1956 [p. 586, lines 11-13].

Dr. Ellis A. Jarvis
[Rep. Tr. Vol. 5, pp. 818-849].

Retired Superintendent of Schools for the Los Angeles City School District [p. 818, lines 23-25]. As Superintendent for the Los Angeles City Schools, Dr. Jarvis had 575 schools under his direct supervision from kindergarten through junior college, encompassing 675,000 pupils [p. 819, lines 9-16].

Bachelor of Arts degree from the University of California at Berkeley; Master of Science degree from the University of Southern California. Honorary Doctorate degree from the Los Angeles College of Osteopathic Physicians and Surgeons [p. 819, lines 19-23; p. 833, lines 1-2].

Marie Louise Kearns
[Rep. Tr. Vol. 10, pp. 778-830].

Author, lecturer, book reviewer, and teacher of creative writing [p. 779, lines 17-18], using the pen-names of Marie Metlova and Louise Hathaway [p. 779, lines 21-22].

Author of three published novels: *No Stranger to My Heart*, which was reviewed by the New York Times and other national reviews; *Black Bread and Caviar*, under the pen-name of Maria Metlova, and *The Enchanted Hour* [p. 780, lines 7-16].

Dr. Warren S. Jones
[Rep. Tr. Vol. 10, pp. 702-778].

Chairman of the Department of Speech and Dramatic Arts at Pepperdine College, Los Angeles [p. 703, lines 12-14]. Pepperdine College has an enrollment of approximately 1450 students [p. 707, line 14].

Dr. Jones teaches at the present time courses in rhetorical criticism (which includes the evaluation of written as well as oral discourse), advanced oral interpretation, and basic speech. Dr. Jones is presently directing four Master's degrees [p. 703, lines 24-26].

Dr. Jones received his Bachelor of Arts degree from David Lipscomb College, Nashville, Tennessee; Master's degree and Doctor of Philosophy degree from Wayne University [p. 704, lines 8-25].

Thomas A. Devine
[Rep. Tr. Vol. 10, pp. 604-641].

Professor of Sociology, Pierce College, Los Angeles [p. 604, lines 18-20]. Pierce College has an enrollment of approximately 9000 students [p. 605, line 3].

Professor Devine received his Bachelor and Master's degrees from Gonzaga University, Spokane, Washington [p. 606, lines 12-15].

John Otis Carney
[Rep. Tr. Vol. 11, pp. 831-875].

Professional writer [p. 831, line 20].

Bachelor of Arts in English from Princeton University [p. 831, lines 23-26].

Author of four published novels: *Love at First Flight, When the Bow Breaks, Yesterday's Hero* and *Good Friday, 1962* [p. 832, lines 11-15].

Author of the films: "Cinerama Holiday" [p. 838, lines 7-10] and "Pete Kelley's Blues" [p. 839, line 4].

Author of articles for Collier's and Coronet magazines [p. 839, lines 19-21].

Mr. Carney has reviewed books for the *Chicago Tribune, Minneapolis Star* and the *Los Angeles Times* [p. 840, lines 9-11].

Mrs. Edith Stafford
[Rep. Tr. Vol. 4, pp. 668-711].

Past President, Los Angeles City Board of Education [p. 670, lines 19-20] and a member of the Board for six years [p. 670, lines 15-16].

At present, lecturer to women's clubs, PTA's and parent groups throughout California [p. 668, lines 21-23].

Bachelor of Arts degree, Pomona College [p. 668, line 26]. Resident of Los Angeles for 36 years [p. 668, line 18].

Dr. Joseph Paul De River

[Rep. Tr. Vol. 11, pp. 877-891].

Psychiatrist and Physician and Surgeon [p. 877, line 24].

Dr. De River took pre-medical training at the University of Alabama and his Doctor of Medicine degree at Tulane University; he interned at Allegheny General Hospital and St. Joseph's Hospital in Reading, Pennsylvania, with specialties in brain surgery, and nervous and mental diseases [p. 879, lines 4-11; p. 891, lines 25-26].

Dr. De River is a Fellow of the American College of Surgeons [p. 880, lines 8-11]; is employed in an advisory capacity to the Los Angeles Municipal and Superior Courts [p. 878, line 20], and has served as a Medical-Legal member of the Adjudication Board of the Sawtelle Veterans Hospital [p. 883, lines 5-7].

From 1937 to 1950 Dr. De River served as Psychiatrist for the Los Angeles Police Department, as well as a consultant to the Arson Bureau, Los Angeles Fire Department [p. 883, lines 10-13].

Dr. De River is author of the published books, *The Sexual Criminal and Crime* and the *Sexual Psychopath* [p. 883, lines 17-22].

At the same time the instant case was being prosecuted and taken on appeal, an action for declaratory relief was filed in the Superior Court of California, for the County of Los Angeles, seeking declaration that *Tropic of Cancer* by Henry Miller was not obscene. The trial court ruled the book obscene under Section 311.2 of the California Penal Code. An appeal was taken resulting in affirmance of the judgment of the trial court (*Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320). Following such decision the Supreme Court of California granted a hearing and transferred the cause to that court (59 A. C. No. 8, p. 1 of minutes). The cause has not yet been set for argument.

IV.

A State Court Jury's Determination of Obscenity When Based on a Valid Statute and Definition of the Term, Should Not Be Disturbed by the Supreme Court of the United States Unless Palpably Erroneous.

Admittedly there exists a difference of opinion as to whether *Tropic of Cancer* is obscene. However, as stated in *People v. Williamson* (1962), 207 A. C. A. 885, 888, 24 Cal. Rptr. 734 (Petition for hearing denied by California Supreme Court, 58 A. C. No. 23, p. 1 of minutes), the question of whether a particular book is obscene is primarily one of fact. Absent an erroneous and prejudically misleading definition of obscenity, the appellate court cannot upset the jury's determination that a book was obscene unless such court can say, upon consideration of the book in its entirety, the jury could not reasonably reach such a conclusion.

As stated in Lockhard and McClure (*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 116):

> "Obscenity cases seldom involve factual disputes relating to the obscenity issue. Occasionally a factual issue may be raised by the testimony of literary experts, or by evidence relating to the audience and method of marketing or to scienter and the knowledge of the seller. In such cases the Supreme Court and other appellate courts should show proper deference to factual findings, though where a finding affects a claim of constitutional right the Supreme Court retains the power to determine whether the evidence supports the findings. . . ."

Petitioner's trial closely followed the guidelines established by this Court in the cases of *Roth-Alberts* and *Smith v. California*. The case presents to this Court the ultimate question of the stability of a state jury's verdict of obscenity fortified by the testimony of eighteen expert witnesses who, by their stature, local and national, are entitled to receive the utmost consideration and respect.

V.

Petitioner Has Not Been Denied His Constitutional Freedom of Speech and the Press.

The book *Tropic of Cancer* is obscene. As held in *Roth-Alberts*, obscenity is not within the area of constitutionally protected speech or press.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

WM. E. DORAN,
Deputy City Attorney,

EDWARD P. GEORGE,
Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

California Penal Code Section 311(e):

"Knowingly" means having knowledge th
matter is obscene. (Stats. 1961, c. 2147, p.
sec. 5).